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In The
Supreme Court of the United States

IN RE: ROY A. RASPANTI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Rule XIX Section 12A of the Louisiana Supreme Court Rules for Lawyer Disciplinary Enforcement violate the First Amendment of the United States Constitution in that it deprives a lawyer of his right of access to the courts?

2. Does Rule XIX Section 12A of the Louisiana Supreme Court Rules for Lawyer Disciplinary Enforcement as interpreted by the Louisiana Supreme Court violate the First Amendment of the United States Constitution in that it deprives a lawyer of his right of access to the courts?

3. Does Rule XIX Section 12A of the Louisiana Supreme Court Rules for Lawyer Disciplinary Enforcement violate the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution in that it deprives a lawyer of his right of access to the courts by prohibiting a lawyer from filing suit against a complainant who defames him in the attorney disciplinary process?

4. Is the public reprimand of a lawyer by the Louisiana Supreme Court based upon Rule XIX Section 12A of the Rules for Lawyer Disciplinary Enforcement for having filed a lawsuit in 2003 against a complainant for defamation in the Office of Disciplinary Counsel, a violation of his right to due process of law under the Fifth and Fourteenth

Amendments to the United States Constitution if the Louisiana Supreme Court did not decide that Rule XIX Section 12A could be the basis for discipline until March 17, 2009?

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CITATIONS OF OPINIONS AND ORDERS

The citation of the opinion of the Louisiana Supreme Court is *In Re: Roy A. Raspanti*, 8 So.3d 526 (La. 3/17/09), #08-B-0954, Rehearing denied 5/22/09. (App. 1a-35a)

JURISDICTIONAL STATEMENT

The decision of the Louisiana Supreme Court was issued on March 17, 2009. (App. 1a-33a) The rehearing was denied on May 22, 2009. (App. 34a-35a) This petition is filed within 90 days thereafter. The court of last resort in Louisiana, the Louisiana Supreme Court, has decided an important federal (constitutional) question in a way that conflicts with the decisions of several United States Courts of Appeals and with decisions of the United States Supreme Court. This court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional, and statutory provisions, which are reproduced in the Appendix at pages 58-59:

U.S. Const. amend. I
U.S. Const. amend. V
U.S. Const. amend XIV
Lawyer Disciplinary Enforcement Rule 19 § 12A

STATEMENT OF THE CASE

Beginning in 1989, Roy Raspanti represented his sister, Janine Raspanti, in several civil matters, at the urging of his parents. Roy Raspanti, in 1989 did not want to represent her in a tort suit and referred her to another attorney who told her that her case was worth about $5,000.00. She asked Roy Raspanti once again to represent her and at the urging of herself and their mother, he relented and agreed to represent her. Later, while he was at the same time representing her in this personal injury case, she asked him to represent her in an employment discrimination case against the United States Army Corps of Engineers in 1992 and in another accident case in 1991.

In 1993, Roy Raspanti successfully obtained a $250,000.00 settlement in the initial 1989 personal injury case. In the Spring of 1994, Janine Raspanti fired Roy Raspanti from the 1991 accident case and from the employment discrimination case against the United States Army Corps of Engineers. On April 27, 1994, she filed a Bar Association complaint against him based upon allegations relating to his fee in the 1989 personal injury case and his representation in the Corps of Engineers case. In her complaint, she alleged that Roy Raspanti had engaged in unethical conduct in both the above-referenced matters. Three months later, the Office of Disciplinary Counsel dismissed her complaint. She appealed the dismissal to a Hearing Committee, and then to the Disciplinary Board. Both the Committee and the Board found the Office of Disciplinary Counsel dismissal to be correct.

In September of 1997[1], Janine Raspanti again reported Roy Raspanti to the Office of Disciplinary Counsel, alleging that he had engaged in a "dishonest, fraudulent and deceitful misrepresentation" in connection with the United States Army Corps of Engineers case and, that he had engaged in document concealment, was "exploitative" and "[breached] his ethics." In short order, the Office of Disciplinary Counsel determined that Janine Raspanti's "new" complaint was so meritless that it did not even require a response from Roy Raspanti and dismissed it without further investigation. Unfortunately, due to an oversight, the Office of Disciplinary Counsel failed to notify Roy Raspanti of Janine Raspanti's September 1997 complaint. Roy Raspanti did not learn of this complaint until the summer of 2001.

In July 1999, Janine Raspanti asked Roy Raspanti to again represent her in her action against the United States Army Corps of Engineers given that each of the two attorneys she had hired to replace him were unable to successfully conclude the matter.

Roy Raspanti initially refused to represent her but, at the behest of his mother and father, and not knowing that Janine Raspanti had filed a second disciplinary complaint against him, he once again agreed to represent her. In 2000 Roy Raspanti obtained $38,544.14 for her on the administrative level and an additional $52,000.00 in the United

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[1] Roy Raspanti had not represented Janine Raspanti since the Spring of 1994.

States District Court for the Eastern District of Louisiana, plus $29,953.84 in attorney's fees in November of 2001.

In December 2001, Janine Raspanti filed a third Office of Disciplinary Counsel complaint against Roy Raspanti. The complaint made a plethora of allegations against Roy Raspanti and even referenced the two prior representations from which respondent had twice been exonerated from wrongdoing. After a six month investigation, the Office of Disciplinary Counsel dismissed the complaint. Janine Raspanti again appealed the Office of Disciplinary Counsel's dismissal, this time all the way to the Louisiana Supreme Court. At each level of appeal, the reviewing body found that the allegations were without merit and affirmed the dismissal. This process lasted until August 29, 2003.

Aside from the allegations of misconduct that Janine Raspanti made against Roy Raspanti to the Office of Disciplinary Counsel in this, her third complaint, she made numerous defamatory statements and accusations regarding him in other contexts. She filed unsuccessful motions in the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit where her employment matter was pending, which motions contained essentially the same complaints she made against him in the Office of Disciplinary Counsel.

Seeking to protect himself from further abuse by Janine Raspanti, and to recover the fees and expenses she still owed him, Roy Raspanti sued her

for breach of contract and defamation in January 2003. He asserted in said suit that she defamed him in the United States District Court for the Eastern District of Louisiana, the United States Court of Appeals for the Fifth Circuit, the Louisiana Supreme Court and the Office of Disciplinary Counsel.

On November 30, 2005, Janine Raspanti reported Roy Raspanti to the Office of Disciplinary Counsel for the fourth time. Roy Raspanti's lawsuit against Janine Raspanti remains pending at this time.

On March 17, 2009, the Louisiana Supreme Court held for the first time in the case of *In Re: Roy A. Raspanti*, #08-B-0954, that Rule XIX Section 12A of the Rules of Lawyer Disciplinary Enforcement accords complainants absolute immunity from civil suits. In so doing, it also found that Roy Raspanti violated Rule XIX Section 12A when he filed suit against complainant Janine Raspanti in 2003 for having defamed him in the Office of Disciplinary Counsel. This was the first time any Louisiana lawyer had ever been sanctioned under Rule XIX Section 12A:

> ". . .we are issuing a sanction for a matter for which no one has been sanctioned previously." *In Re: Roy A. Raspanti*, 8 So.3d 526, 540

At the time that Roy Raspanti filed suit against the complainant in 2003, Rule XIX Section 12A could not be the basis for discipline.

The federal question relative to question 1 herein (First Amendment of the United States Constitution) was raised in the Application for Rehearing filed in the Louisiana Supreme Court. (See 5/5/09 Supplemental Memorandum in Support of Respondent's Application for Rehearing, App. 36a-48a.) The federal question relative to question 2 herein was raised in the Application for Rehearing filed in the Louisiana Supreme Court. (See 3/31/09 Application for Rehearing, p. 6-8 (App. 52a-57a); 4/14/09 Response to Opposition of Office of Disciplinary Counsel to Respondent's Application for Rehearing, p. 6, App. 49a-51a).

ARGUMENT

1. DOES RULE XIX SECTION 12A OF THE LOUISIANA SUPREME COURT RULES FOR LAWYER DISCIPLINARY ENFORCEMENT VIOLATE THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN THAT IT DEPRIVES A LAWYER OF HIS RIGHT OF ACCESS TO THE COURTS BY PROHIBITING A LAWYER FROM FILING SUIT AGAINST A COMPLAINANT WHO DEFAMES HIM IN THE ATTORNEY DISCIPLINARY PROCESS?

It is respectfully submitted that this Honorable Court should review this Writ of Certiorari for the reason that the state court of last resort for the State of Louisiana, *i.e.*, the Louisiana Supreme Court, has decided an important federal (constitutional) question in a way that conflicts with decisions of the United States Court of Appeals for

the Fourth, Fifth and Seventh Circuits and relevant decisions of the United States Supreme Court.

More Particularly, the Louisiana Supreme Court's March 17, 2009 decision in *In Re: Roy A. Raspanti*, #08-B-0954, 8 So.3d 526 (La. 2009, 3/17/09), that Rule XIX Section 12A of the Rules of Lawyer Disciplinary Enforcement "accords complainants absolute immunity from civil suits. . ." (*In Re: Roy A. Raspanti,* p. 540), conflicts with *Chambers v. Baltimore and Ohio Railroad*, 207 U.S. 142, 28 S. Ct. 34, 35, 52 L. Ed. 143 (1907); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 642 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 417, 83 S. Ct. 328, 336 L. Ed. 405 (1963); *Ryland v. Shapiro*, 708 F.2d 967, 971-971 (5th Cir. 1983); *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1363 (5th Cir. 1983); *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972); *Harris v. Pate*, 440 F.2d 315, 317 (7th Cir. 1971).

The legal issue before it according to the Louisiana Supreme Court in *In Re: Roy A. Raspanti*, #08-B-0954, was *"res nova"* (*In Re: Roy A. Raspanti*, 8 So.3d 526, 528, footnote 1) and was stated by the court as follows:

> ". . .whether an attorney's violation of Rule XIX Section 12(A) can be the basis for discipline and the imposition of sanctions. *In Re: Roy A. Raspanti*, 8 So.3d 526, 528.

Rule XIX Section 12A of the Rules of Lawyer Disciplinary Enforcement states:

Section 12. Immunity

"A. From Civil Suits. Communications to the board, hearing committees, or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged, and no lawsuit predicated thereon may be instituted against any complainant or witness. Members of the board, members of the hearing committees, disciplinary counsel, staff, probation monitors and monitoring lawyers appointed pursuant to this rule or its appendices, inventorying lawyers appointed pursuant to Section 27, members of the Ethics Advisory Committee adopted by resolution to the House of Delegates and approved by the Board of Governors of the Louisiana State Bar Association on November 2, 1991 and members of the Lawyer Advertising Advisory Service Committee adopted by resolution to the House of Delegates and approved b y the Board of Governors of the Louisiana State Bar Association on June 9, 1995, shall be immune from suit for any conduct in the course of their official duties or reasonably related to their official duties.

B. From Criminal Prosecution. Upon application by disciplinary counsel and

> notice to the appropriate prosecuting authority, the court may grant immunity from criminal prosecution to a witness in a discipline or disability proceeding."

The Louisiana Supreme Court found that Rule XIX Section 12A accords complainants absolute immunity from civil suits. *In Re: Roy A. Raspanti*, 8 So.3d 526, 540. The court also found that an attorney is subject to discipline for filing suit against a complainant. It found that filing suit against a complainant is a violation of Rule XIX Section 12A and violation of that rule can be the basis for discipline and the imposition of sanctions. More particularly, it found that Roy Raspanti, by filing suit against a complainant for defamation in 2003 violated Rule XIX Section 12A, an action that subjected him to the disciplinary process. *In Re: Roy A. Raspanti*, p. 534-535.

It is respectfully submitted that as a result of this decision of the Louisiana Supreme Court, Rule XIX Section 12A of the Louisiana Supreme Court Rules for Lawyer Disciplinary Enforcement violates the First, Fifth and Fourteenth Amendments of the United States Constitution in that it deprives lawyers of their right of access to the courts. It is respectfully submitted that only a compelling state interest will justify such a deprivation. It is respectfully submitted that there is no compelling state interest which will justify such an intrusion.

The United States Court of Appeals for the Fifth Circuit stated the following in *Ryland v. Shapiro*, 708 F.2d 967, 971-972 (1983):

> *"The Substantive Right of Access to Courts:*
>
> The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution. In *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 28 S. Ct. 34, 52 L. Ed. 143 (1907), the Supreme Court characterized this right of access in the following terms:
>
> > The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.
>
> 207 U.S. at 148, 28 S. Ct. at 35 (citations omitted). It is clear that the Court viewed the right of access to the courts as one of the

privileges and immunities accorded citizens under Article 4 of the Constitution and the Fourteenth Amendment.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), the Supreme Court found in the First Amendment a second constitutional basis for this right of access: 'Certainly the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right of petition.' *Id.* 92 S. Ct. at 612. This court recognized the First Amendment right of access to the courts in *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979), where we stated: 'It is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances.' *Id.* at 1387. See also *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S. Ct. 328, 3369 L. Ed. 2d 405 (1963); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1363 (5th Cir. 1983).

A number of other courts have also recognized that this right of access is encompassed by the First Amendment right to petition. See *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972); *Harris v. Pate*, 440 F.2d 315, 317 (7th Cir. 1971); *Pizzolato v. Perez*, 524 F. Supp. 914, 921 (E.D. La. 1981); *Creus v. Pertrosky*, 509 F. Supp. 1199, 1204 n. 10 (W.D. Pa. 1981).

> . . .In conclusion, it is clear that, under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivation by the state, *and only compelling state interests will justify such intrusions."* (Emphasis added)

The Fifth Circuit also pointed out that another constitutional basis for the right of access to the courts is found in the due process clause. See p. 972, *Ryland.*

In *N.A.A.C.P. v. Button*, 83 S. Ct. 328, 340-341 (1983) the State of Virginia contended that it had a subordinating interest in the regulation of the legal profession which justified limiting the petitioner's First Amendment rights. Virginia argued that N.A.A.C.P.'s activities fell "within the traditional purview of state regulation of professional conduct." See p. 340-341, *N.A.A.C.P.* The Supreme Court stated:

> ". . .The decisions of this Court have consistently held that only a *compelling state interest* in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by the petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. *For a State may not, under the guise of prohibiting professional misconduct,*

> *ignore constitutional rights.* See *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 742, 1 L. Ed. 2d 796; *Konigsberg v. State Bar*, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810. Cf. *In re: Sawyer*, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 1473. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488, we said, 'In the domain of these *indispensable liberties, whether of speech, press, or association*, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' Later, in *Bates v. Little Rock*, 361 U.S. 516, 524, 80 S. Ct. 412, 417, 4 L. Ed. 2d 480, we said, '[w]here there is a significant encroachment upon *personal liberty*, the State may prevail only upon showing a subordinating interest which is *compelling*.' Most recently, in Louisiana ex rel. *Gremillion v. NAACP*, 366 U.S. 293, 297, 81 S. Ct. 1333, 1336, 6 L. Ed. 2d 301, we reaffirmed this principle: '. . .regulatory measures . . .no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.'" (Emphasis added) p. 341.

It is noteworthy that the Louisiana Constitution is in accord with the law set out by the above-referenced courts.

Article 1 Section 22 of the Louisiana Constitution states:

"§ 22. Access to Courts

Section 22. All courts shall be open, and every person *shall* have an adequate remedy by *due process of law* and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, *reputation*, or other rights." (Emphasis added)

Also pertinent are Article 1 Sections 1 and 7:

"§ 1. Origin and Purpose of government

Section 1. All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are *inalienable* by the state and shall be preserved inviolate by the state." (Emphasis added)

and

"§ 7. Freedom of Expression

Section 7. No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, *but is responsible for abuse of that freedom*." (Emphasis added)

The Louisiana Supreme Court first addressed this law in *Kennedy v. Item Co.*, 34 So.2d 886, 890 (La. 1948), a case decided under the Louisiana Constitution of 1921 but is still pertinent today:

> " The very foundation upon which the law of libel is laid is the protection of reputation. The right to a good name and fame is as absolute and as essential to the 'pursuit of happiness' as is the right to life and liberty, characterized in our Declaration of Independence as among those 'inalienable rights with which all men, being created equal, are endowed by their Creator.' A man's reputation is recognized to be as invaluable, and is given the same dignity in the Bill of Rights that comprises Article I of our Constitution, as his right to due process of law in the protection of his life, liberty, and property. . .: freedom of religion. . .; freedom of speech and of the press. . .; peaceable assemblage. . .; and freedom from unreasonable searches and seizures. . .; for in Section 6 (present Section 22 of the Louisiana Constitution) of this article we find the guaranty that '*All courts shall be open, and every person for injury done him in his* rights, lands, goods, person or *reputation shall have adequate remedy by due process of law* and justice administered without denial, partiality or unreasonable delay.' Thus the general declaration in Section 3 (present Section 7 of the Louisiana Constitution) of the Bill of Rights that 'No law shall ever be passed to curtail or restrain the liberty of speech or of

> the press,' is not only qualified by the clause immediately following that 'any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty,' but also by the specific guaranty in Section 6 (present Section 22 of the Louisiana Constitution) that the courts are open for the redress of injury to reputation by the irresponsible use of the right to freely express one's sentiments." (Emphasis in text)

It is respectfully submitted that the Louisiana Supreme Court's holding that a lawyer is prohibited by Rule XIX Section 12A from filing a lawsuit against a complainant for having filed a malicious complaint against him no matter how malicious and no matter how many times it has been done - for the purpose of defending his reputation from such malicious attacks denies said lawyer access to the courts in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution.

It is respectfully submitted that Rule XIX Section 12A was promulgated by the Louisiana Supreme Court, a state entity, and directly abridges speech, thus the protections of the First Amendment apply to this Rule. *In Re: Ivan David Warner and Steven Joseph Rando*, #05-B-1303, Westlaw #1025823 ____ So.3d _____; *Warner, supra*, p. 11, 77.

There is no compelling state interest which would justify this violation of the First Amendment by Rule XIX Section 12A. It is respectfully submitted that the main reason put forth by the Office of Disciplinary Counsel for Rule XIX Section

12A is to encourage the filing of complaints and cooperation with disciplinary investigations. It is further respectfully submitted that encouraging the filing of complaints and cooperation with disciplinary investigations are not compelling state interests. In a recent case decided by the Louisiana Supreme Court on April 17, 2009, *In Re: Ivan David Warner and Steven Joseph Rando*, #05-B-1303, Westlaw #1025823 ____ So.3d _____ dealing with the confidentiality rule in lawyer disciplinary proceedings, the court utilized the findings of four courts that had completed an in-depth First Amendment analysis of confidentiality rules in the context of an attorney discipline system.

The court pointed out on page 67 of said opinion, that two of the four courts (*R.M. v. Sup. Ct.*, 883 A.2d at 378-379 and *Doe v. Doe*, 127 S.W.3d at 735) that completed an in-depth First Amendment analysis of confidentiality rules in the context of an attorney discipline system explicitly held that the interest of encouraging the filing of complaints and encouraging participants to cooperate with disciplinary investigations did not qualify as compelling under strict scrutiny. The Louisiana Supreme Court also pointed out that the other two courts who completed this study (*Petition of Brooks*, 678 A.2d at 145 and *Doe v. Sup. Ct.*, 734 F. Supp. at 985) also held that the confidentiality rules in question could not survive strict scrutiny on the basis of these interests but on different grounds.

As the Louisiana Supreme Court pointed out on page 52 of its April 17, 2009 opinion in the *Warner* case cited above:

> " We must approach the strict scrutiny analysis 'with the posture the Supreme Court has long prescribed for this inquiry: 'It is the rare case in which . . .a law survives strict scrutiny.'"

It is respectfully submitted that this is not that rare case.

It is respectfully submitted that Rule XIX Section 12A also violates the due process clause of the Fourteenth Amendment of the United States Constitution. The Louisiana Supreme Court stated in *Warner* on page 11 (*supra*):

> " The First Amendment to the United States Constitution provides that 'Congress shall make no law . . .abridging the freedom of speech.' U.S. Const. Amend. 1. In a series of cases, the Supreme Court has held, 'that the liberty of speech and of the press which the First Amendment guarantees against abridgement by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action.' *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 779, 98 S. Ct. 1407, 1417, 55 L. Ed. 2d 707 (1978)."

Furthermore, as has already been seen, the Louisiana Constitution is in accord with this position:

> "§ 22. Access to Courts

> Section 22. All courts shall be open, and every person *shall* have an adequate remedy by *due process of law* and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, *reputation*, or other rights." (Emphasis added)

The court in *Brody v. Mather*, 460 F.3d 106, 107 (D.C. Cir. 2006) stated:

> " The Supreme Court has long recognized that citizens have a right of access to the courts. . . .The Supreme Court has grounded the right at various times in different provisions of the Constitution: the 'Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses.' *Christopher v. Harbury*, 536 U.S. 403, 415 n. 12, 122 S. Ct. 2179, 158 L. Ed. 2d 413 (2002) ("Harbury III") (citations omitted)."

The court in *Nelson v. Mustian*, 502 F. Supp. 698, 705 (1980) stated:

> " The due process clause of the fourteenth Amendment ensures that state and local governments may act against individuals only within certain parameters. Citizens' fundamental rights may be limited only when the government can show that it is promoting a compelling or overriding interest.

Fundamental rights include those specifically enumerated in the Bill of Rights plus a very small group of penumbral rights. See, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). When fundamental rights are not involved, a governmental act will be upheld if it is rationally related to any legitimate governmental objective:

> We think it plain that individual liberties may be ranked in a spectrum of importance. At one end of the spectrum are the great liberties such as speech, religion, and association specifically guaranteed in the Bill of Rights. Of equal importance are liberties such as the right of marital privacy that are so fundamental that, even in the absence of a positive command from the Constitution, they may be restricted only for compelling state interests. At the other end of the spectrum are the lesser liberties that may be invaded by the state subject only to the same minimum test of rationality that applies to all state action. See, *e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963).

Karr v. Schmidt, 460 F.2d 609, 615 (5th Cir. 1972).

This position on the issue of due process was also stated by the Louisiana Supreme Court in the *Kennedy* case (*supra*).

2. THE PUBLIC REPRIMAND OF A LAWYER BY THE LOUISIANA SUPREME COURT BASED UPON RULE XIX SECTION 12A OF THE RULES FOR LAWYER DISCIPLINARY ENFORCEMENT FOR HAVING FILED A LAWSUIT IN 2003 AGAINST A COMPLAINANT FOR DEFAMATION IN THE OFFICE OF DISCIPLINARY COUNSEL IS A VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW BECAUSE THE LOUISIANA SUPREME COURT DID NOT DECIDE THAT RULE XIX SECTION 12A COULD BE THE BASIS FOR DISCIPLINE UNTIL MARCH 17, 2009

The issue resolved by the Louisiana Supreme Court by its March 17, 2009 opinion was *res nova*. Page 2, footnote 1, 3/17/09 Judgment, #08-B-0954, *In Re: Roy Raspanti*, 8 So.3d 526, 528. It is now the law. It is respectfully submitted that by virtue of the fact that the issue resolved therein by the Louisiana Supreme Court was *res nova*, it was not the law prior to March 17, 2009. As the Louisiana Supreme Court stated in page 23 of its March 17, 2009 decision:

> " First, we are issuing a sanction for a matter for which no one has been sanctioned previously. *There are statements in the jurisprudence that might indicate the possibility of our arriving at an interpretation*

> *of Rule XIX Sec. 12(A) contrary to the interpretation we issue today.* For example, the Board in *Harris, supra,* as recently as 2003, indicated Sec. 12(A) did not provide a sanction; the Board in the instant case found the Rule clear and unambiguous." (Emphasis added)

It is respectfully submitted that sanctioning respondent for violating the law first announced by the Louisiana Supreme Court on March 17, 2009 on this *res nova* issue because of an action he took in 2003 is fundamentally unfair and is a violation of the due process clause of the Fourteenth Amendment.

In the criminal setting, denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice. *Linden v. Dickson,* C.A. 9 (Cal.) 1961, 287 F.2d 55. It is respectfully submitted that in the case at bar, the same holds true. The public reprimand of a lawyer by the Louisiana Supreme Court based upon Rule XIX Section 12A for having filed a lawsuit in 2003 against a complainant for defamation in the Office of Disciplinary Counsel is a failure to observe the fundamental fairness essential to the very concept of justice when the Louisiana Supreme Court did not decide that Rule XIX Section 12A could be the basis for discipline until March 17, 2009.

The Louisiana Supreme Court is a state entity. Acting under its constitutional and inherent authority, the court adopted Louisiana Supreme Court Rule XIX. Louisiana Supreme Court Rule XIX

Section 1 ("Under the authority of Article V, Section 5(A) and (B) of the Louisiana Constitution of 1974 and the inherent power of this court . . .the following Rules for Lawyer Disciplinary Enforcement be and are hereby adopted.") Thus the protection of the First, Fifth and Fourteenth Amendments are applicable to this matter. See *In Re: Ivan David Warner and Steven Joseph Rando*, #05-B-1303, Westlaw #1025823, p. 11; _____ So.3d _____.

Respectfully submitted,

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FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #015

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **17th day of March, 2009**, are as follows:

BY WEIMER, J.:

2008-B -0954 IN RE: ROY A. RASPANTI
(Disciplinary Proceedings)

Accordingly, we conclude that a public reprimand issue against Respondent, and that he be cast for costs of these proceedings. PUBLIC REPRIMAND IMPOSED; RESPONDENT CAST FOR COSTS OF THESE PROCEEDINGS.

03/17/09

SUPREME COURT OF LOUISIANA

08-B-0954

IN RE: ROY A. RASPANTI

Attorney Disciplinary Proceedings

WEIMER, J.

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (ODC) against attorney Roy A. Raspanti (Respondent). The charges alleged, in part, that he filed a defamation suit against a former client based on a complaint she filed with the ODC. The ODC asserted Respondent's actions violated Section 12 of Louisiana Supreme Court Rule XIX (Rule XIX), which provides, in part, that communications to the disciplinary board, the hearing committee, and the ODC "shall be absolutely privileged" and that "no lawsuit predicated thereon may be instituted against any complainant or witness."

Both the hearing committee and the disciplinary board found Respondent's conduct violated Rules 3.1, 8.4(a), and 8.4(d) of the Rules of Professional Conduct. Furthermore, the hearing committee determined Respondent violated the "spirit" of Rule XIX, § 12(A), and the disciplinary board found his conduct was in "direct violation" of that provision.

Because this court has never specifically addressed the effect of Section 12(A), we docketed the matter on our own motion in order to address the legal issue raised herein: whether an attorney's violation of Rule XIX, § 12(A) can be the basis for discipline and the imposition of sanctions.[1]

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[1] Respondent filed an objection in this court to the disciplinary board's recommendation, but the filing was not within the time limits of Louisiana Supreme Court Rule XIX, § 11(G)(1). Ordinarily, the filing of objections in a bar

FACTS

The following facts are undisputed and supported by the record. Thus, if we agree with the committee's and the board's resolution of the legal issue, the ODC will have met its burden of proof by clear and convincing evidence.

Over the years, Respondent has represented his sister, Janine Raspanti, in various civil matters, at the urging of his parents. In 1994, Ms. Raspanti filed the first of several disciplinary complaints against Respondent with the ODC; she alleged that Respondent had engaged in unethical conduct in representing her in two civil suits for damages. For the most part, her complaints stemmed from disputes between herself and Respondent concerning the payment of legal fees. In each instance, the ODC found no clear and convincing evidence of ethical misconduct by Respondent and dismissed the complaint. As is the right of every complainant under the provisions of Rule XIX, Ms. Raspanti appealed the dismissal of each of her complaints to a hearing committee, to the disciplinary board, and to this court. Again, in each instance, the ODC's decision to dismiss the complaint against Respondent was affirmed.

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disciplinary case determines how the case is treated. In a "no objection" matter under Rule XIX, § 11(G)(1)(a), this court may enter an order based on the recommended disciplines with written reasons, which may be summary in nature. By contrast, the filing of an objection mandates that the case be scheduled for oral argument under Rule XIX, § 11(G)(1)(b). Despite the fact that this is technically a "no objection" case, we chose to schedule oral argument and docket the case for a full opinion because the issue is *res nova* with this court.

Ms. Raspanti's second complaint was filed in 1997. According to Respondent, Ms. Raspanti alleged he had engaged in a "dishonest, fraudulent and deceitful misrepresentation" and that he engaged in document concealment, was "exploitive" and breached "his ethics." The ODC determined that Ms. Raspanti's "new" complaint was meritless, did not require a response from Respondent, and warranted dismissal without further investigation. Unfortunately, due to an oversight, the ODC did not notify Respondent of the 1997 complaint. Respondent avers he would not have undertaken a subsequent representation of his sister in 1999 had he known of her second complaint in 1997. During the years, Respondent obtained judgments in favor of his sister, but the disputes over fees continued.

Ms. Raspanti filed her third complaint with the ODC in December of 2001. In March and April of 2002, she made five communications to the ODC, in which she restated her continuing dissatisfaction with Respondent. Again, the ODC responded by dismissing her complaints.

In January 2003, Respondent filed a lawsuit against Ms. Raspanti for breach of contract and defamation. The third cause of action contained in Respondent's petition specifically asserted defamation by Ms. Raspanti because of the complaints she had filed against him with the ODC. In response to the petition, Ms. Raspanti asserted the defense of immunity pursuant to Rule XIX, § 12(A). Respondent opposed the exception, arguing that, at a minimum, Ms. Raspanti was not immune from liability for defamatory statements she made in

her complainant appeals filed in this court, a body which is not specifically listed in Rule XIX, § 12(A).[2]

Following a mediation effort in early 2004, the attorney for Ms. Raspanti's insurer sent a letter to the other parties and their counsel stating, in part:

> Both parties agree to execute a Release Agreement which will prevent them from ever bringing any further disciplinary complaints or lawsuits arising out of or in any way connected with Roy's representation of Janine over the past ten years. Roy will receive payment of $3,000.00. Janine will agree that if she defames Roy in the future, and he successfully prosecutes to final judgment a claim for that defamation, Janine will pay him, in addition to the actual damage award, a penalty of $15,000 plus reasonable attorney's fees.

Thereafter, Respondent forwarded to Ms. Raspanti's attorneys a two-page settlement proposal which contained the essence of the above statement. Respondent also proposed that: "In the event that Roy Raspanti ever obtains a final collectible judgment against Janine M. Raspanti for libel, slander, or defamation, for any incidents occurring

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[2] In December 2003, the trial court granted Ms. Raspanti's motion to dismiss Respondent's defamation claims "based on complaints to the disciplinary board, including the appeal to the Supreme Court." Respondent filed a notice of intent to seek supervisory writs from the trial court's ruling, but it appears that the application was never filed in the court of appeal.

after the date of this agreement, Janine M. Raspanti agrees to pay Roy Raspanti, in addition to the actual damage award, an additional penalty of $15,000 plus reasonable attorney's fees and costs." Ms. Raspanti did not agree to Respondent's settlement proposal, and Respondent's lawsuit against her remains pending at this time.

DISCIPLINARY PROCEEDINGS

On December 19, 2006, the ODC filed one count of formal charges against Respondent, alleging that his conduct as set forth above violated Rule XIX, § 12(A) as well as the following provisions of the Rules of Professional Conduct: Rules 8.4(a) (violation of the Rules of Professional Conduct) and 8.4(d) (engaging in conduct prejudicial to the administration of justice).[3] Respondent answered the formal charges and denied any misconduct.

Formal Hearing:

This matter proceeded to a formal hearing on May 15, 2007. Respondent appeared at the hearing and was represented by counsel. The committee received documentary evidence from both

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[3] In its recommendation to this court, the disciplinary board noted that the ODC's pre-hearing memorandum also alleged Respondent's conduct violated Rule 3.1 entitled "Meritorious Claims and Contentions." Respondent thereafter filed a motion to strike allegations relative to Rule 3.1 of the Rules of Professional Conduct. Citing **Louisiana State Bar Association v. Keys**, 567 So.2d 588, 591 (La. 1990), the hearing committee concluded fair and adequate notice of the nature of the misconduct had been given to Respondent, and therefore, the Rule 3.1 claim could be pursued by ODC.

Respondent and the ODC. The ODC called attorney Thomas Buck to testify in person before the hearing committee. Mr. Buck represented Janine Raspanti and her homeowner's insurer in connection with the defamation and breach of contract lawsuit filed against her by Respondent.

Respondent testified on his own behalf and on cross-examination by the ODC. In his testimony, Respondent stated that he agreed to represent Ms. Raspanti at the urging of their parents. According to Respondent, Ms. Raspanti filed disciplinary complaints against him whenever she did not want to pay him his fee. He filed a lawsuit against her because he believed he had a cause of action for defamation. However, he amended the lawsuit to remove the defamation cause of action based on Ms. Raspanti's disciplinary complaints and her complainant appeals to the ODC, hearing committees, and disciplinary board, but kept the defamation cause of action based upon her complainant appeals to this court. He also added the causes of action of abuse of process and malicious prosecution based on **Goldstein v. Serio**, 496 So.2d 412 (La.App. 4 Cir. 1986), writs denied, 501 So.2d 208, 209 (La. 1987), and **Sommer v. State, Department of Transportation and Development**, 97-1929 (La.App. 4 Cir. 3/29/00), 758 So.2d 923, writ denied, 97-1929 (10/27/00), 772 So.2d 122. Respondent also stated that he sent the proposed settlement agreement to Mr. Buck in response to Mr. Buck's February 12, 2004 letter, which summarized Mr. Buck's view of the settlement reached during the mediation. He testified that he did not think any of the provisions were going to be

enforceable, but the judge and the mediator were strongly urging the parties to come to some sort of agreement. Therefore, he responded in good faith with his proposed settlement agreement.

Hearing Committee Report:

After considering the evidence and testimony presented at the hearing, the committee made the following findings.

Respondent filed a lawsuit against Ms. Raspanti that alleged a claim for defamation based upon various disciplinary complaints Ms. Raspanti had filed with the ODC and appeals to the hearing committee and disciplinary board, which claim is precluded by Rule XIX, § 12(A) and, therefore, is a non-meritorious action. Mr. Buck wrote to Respondent's attorney, raising the issue of Rule XIX, § 12(A) and requesting a dismissal of the defamation claim. Respondent amended the lawsuit but did not remove the defamation claim entirely. The third cause of action listed communications to the ODC and there was no clear delineation that the cause of action was based only on defamation in the Fifth Circuit Court of Appeals, United States District Court, and the Louisiana Supreme Court. On December 9, 2003, the trial court dismissed the defamation claim. Respondent's reliance on **Goldstein** is misplaced because the court of appeal based its decision on the Louisiana State Bar Association's Articles of Incorporation, Article XV, § 13 (repealed), which does not appear to specifically provide an absolute preclusion of suit based upon communications to the disciplinary board as is

contained in Rule XIX, § 12(A). Respondent's reliance on **Sommer** is also misplaced because **Sommer** does not interpret Rule XIX, § 12(A). Respondent wrote to Mr. Buck on March 9, 2004, and proposed a settlement agreement that included monetary penalties against Ms. Raspanti if she filed future disciplinary complaints against him. If executed, the agreement would have had a "chilling effect" on the filing of such complaints in the future.

Based on these findings, the committee determined that Respondent violated the spirit of Rule XIX, § 12(A) and also violated Rules 3.1, 8.4(a), and 8.4(d) of the Rules of Professional Conduct. The committee also determined that Ms. Raspanti suffered no direct harm. The only aggravating factor found by the committee was Respondent's refusal to acknowledge the wrongful nature of the conduct.

The committee further found that Ms. Raspanti filed at least two non-meritorious complaints against Respondent, and Respondent only represented her at the insistence of their parents. The committee indicated it appreciated Respondent's frustration with his sister and expressed sympathy with his plight, but stated that "we have no choice but to recognize the violation and recommend a sanction." Accordingly, the committee recommended that Respondent be publicly reprimanded.

Neither Respondent nor the ODC filed an objection to the hearing committee's recommendation.

Disciplinary Board Recommendation:

After review, the disciplinary board determined that the hearing committee's factual findings are not manifestly erroneous. The board found Respondent's conduct violated Rules 3.1, 8.4(a), and 8.4(d) of the Rules of Professional Conduct. Furthermore, the board determined Respondent engaged in conduct that was in direct violation of Rule XIX, § 12(A).

Regarding Respondent's reliance on **Goldstein**, the board noted that the **Goldstein** decision was rendered prior to the promulgation of Rule XIX, § 12(A), which became effective April 1, 1990. Regarding Respondent's reliance on **Sommer**, the board agreed with the committee that **Sommer** does not address Rule XIX, § 12(A).

The board determined that Respondent knowingly violated duties owed to the legal system and to Ms. Raspanti. He caused harm to Ms. Raspanti in that she was forced to defend the defamation claims. Furthermore, Respondent's retaliatory action threatens to undermine the disciplinary system. Relying on the ABA's *Standards for Imposing Lawyer Sanctions*, the board determined that the baseline sanction is suspension.

In aggravation, the board found the following factors: refusal to acknowledge the wrongful nature of the conduct, lack of remorse, substantial experience in the practice of law (since 1975), and indifference to making restitution or minimizing the harmful effects of the misconduct. The only

mitigating factor found by the board is the absence of a prior disciplinary record.

Considering the above, the board recommended that Respondent be suspended for one year with all but three months deferred. The board further recommended that Respondent be placed on unsupervised probation for nine months following the active period of the suspension, subject to the condition that any misconduct during this period may be grounds for making the deferred suspension executory or imposing additional discipline, as appropriate. Finally, the board recommended that Respondent be assessed with all costs and expenses of these proceedings.

DISCUSSION

The United States Supreme court has characterized attorney disciplinary proceedings as quasi-criminal in nature. **In re Ruffalo**, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed. 2d 117 (1968). Rule XIX, § 18(A), states that "[d]isciplinary proceedings are neither civil nor criminal but are sui generis."

Louisiana Supreme Court Rule XIX, § 12(A):

The core legal issue in this matter relates to the interpretation and effect of Rule XIX, § 12. Rule XIX is entitled "Rules for Lawyer Disciplinary Enforcement;" Section 12 is entitled "Immunity" and provides immunity from civil suits and criminal prosecutions. Specifically, this court is called upon to decide whether a violation of Rule XIX, § 12(A) can

be the basis for discipline and the imposition of sanctions.

Rule XIX, § 9(a) states that it shall be ground for discipline for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, or any other rules of this jurisdiction regarding professional conduct of lawyers." Clearly, Rule XIX, § 12(A) is not a provision of the Rules of Professional Conduct. See Louisiana State Bar Association (LSBA) Articles of Incorporation, Art. XVI, Rules of Professional Conduct, Rule 1.0, *et seq.* Thus, the sole question presented is whether Rule XIX, § 12(A) is one of the "other rules of this jurisdiction regarding professional conduct of lawyers."

It will be helpful to consider these provisions in their historical perspective.

In the late 1980s, the Louisiana Supreme Court recognized that the state bar was experiencing an "ethics crisis." Address by Chief Justice John A. Dixon, Press Conference (Feb. 6, 1990), cited in *The New Louisiana Disciplinary Enforcement Rules v. The Old Rules: A Comparison*, 36 Loy. L. Rev. 433 (1990). With a significant increase in this state's lawyer population, the number and complexity of complaints had increased, overburdening the then existing disciplinary system. This court requested that the American Bar Association (ABA) Standing Committee on Professional Discipline evaluate Louisiana's disciplinary enforcement procedures. ***Id.*** at 438. An ABA team came to Louisiana and conducted the evaluation, and thereafter issued a report, "Professional Discipline for Lawyers and

Judges," on the areas of Louisiana's system that the team concluded were in need of revision.[4] After the submission of the report in July of 1987, this court appointed a committee to review the ABA's findings. ***Id.***

However, in 1989, while the local review was pending, the ABA adopted the Model Rules for Lawyer Disciplinary Enforcement. This court responded by discontinuing its own evaluation project and adopting and promulgating the ABA's new model rules regarding disciplinary enforcement, La. S. Ct. Order (Feb. 6, 1990), making Louisiana the first state to use the new ABA Model Rules for Lawyer Disciplinary Enforcement. ***Id.*** at 433.

In 1990, Article XV, "Discipline and Disbarment of Members," of the LSBA Articles of Incorporation was vacated and repealed. In its place, Louisiana Supreme Court Rule XIX was reenacted[5]

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[4] Suggestions for reform were made concerning: 1) structure of the disciplinary system, such as separation of the duties of the executive counsel from disciplinary duties; 2) intake and docket procedures; 3) investigation; 4) disposition after investigation; and 5) sanctions. The report noted an absence of provisions for complainant appeals and for witness immunity from criminal prosecutions and recommended the addition of same. Although the existing bar rule, Art. XV, § 13, provided an absolute privilege for complaints to the disciplinary committee, but did not provide immunity from the instigation of civil suits, the ABA team did not note that deficiency.

[5] Prior to the reenactment, Louisiana Supreme Court Rule XIX provided: "All matters touching upon the discipline and disbarment of members of the bar shall be governed by Article XV of the Articles of Incorporation of the Louisiana

to incorporate the "Rules for Lawyer Disciplinary Enforcement." The "Rules of Professional Conduct" remained and still are in Article XVI of the LSBA Articles of Incorporation.[6] However, the reenacted Rule XIX changed the disciplinary procedure and the sanctions imposed for professional misconduct. ***Id.*** at 445. Additionally, there was a change in the provision related to a privilege for complaints to the disciplinary committee of the LSBA.

The previous "Privileges and Immunities" provision, Art. XV, § 13 provided, in pertinent part:

> [1] Complaints filed with the Committee in accordance with these rules shall be absolutely privileged
>
> and
>
> [2] all communications and evidence predicated thereon shall not be admissible in any court in this State in proceedings against the person filing such complaints.

State Bar Association, as amended, and as approved by this court." La. S. Ct. R. XIX (West 1988) (repealed 1990).

[6] The rules are divided into eight categories:

1. Client-Lawyer Relationship;
2. Counselor;
3. Advocate;
4. Transactions with Persons Other Than Clients;
5. Law Firms and Associations;
6. Public Service;
7. Information about Legal Services; and
8. Maintaining Integrity of the Profession.

The replacement for Art. XV, § 13, Paragraph A of Section 12, of Rule XIX entitled "Immunity,"[7] states, in pertinent part:

> [1] Communications to the board, hearing committees, or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged,
>
> and
>
> [2] no lawsuit predicated thereon may be instituted against any complainant or witness.

Obviously, both provisions create an absolute privilege. However, Art. XV, § 13 implicitly recognized that complainants could be sued, whereas Rule XIX, § 12(A) prohibits such suits.

The key words in both provisions are "absolutely privileged." A "privilege" as it relates to the law of libel and slander is defined as an "exemption from liability for the speaking or publishing of defamatory words concerning another, based on the fact that the statement was made in the performance of a duty, political, judicial, social, or personal." BLACK'S LAW DICTIONARY, 1360 (4th ed. 1968). An "absolute privilege" is defined as a

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[7] Immunity from criminal prosecution which had been recommended by the ABA team was enacted in Paragraph B of Section 12, as follows: "Upon application by disciplinary counsel and notice to the appropriate prosecuting authority, the court may grant immunity from criminal prosecution to a witness in a discipline or disability proceeding."

"privilege that immunizes an actor from suit, no matter how wrongful the action might be, and even though it is done with an improper motive." BLACK'S LAW DICTIONARY, 1215 (7th ed. 1999). Louisiana jurisprudence has consistently held that communications made in judicial or quasi-judicial proceedings carry an absolute privilege so that witnesses, bound by their oaths to tell the truth, may speak freely without fear of civil suits for damages. **Knapper v. Connick**, 96-0434, p. 3 (La. 10/15/96), 681 So.2d 944, 946, *citing* **Bienvenu v. Angelle**, 254 La. 182, 223 So.2d 140 (1969), overruled on other grounds, **Gonzales v. Xerox Corporation**, 320 So.2d 163 (La. 1975). This court has recognized the difference between absolute immunity, which defeats a suit at the outset, and qualified immunity, which depends on circumstances and motivations and often must be established by evidence at trial. **Knapper**, 96-0434 at 6, 681 So.2d at 948.

The key words in the additional sentence of Rule XIX, § 12(A)–and no lawsuit predicated thereon may be instituted against any complainant or witness–are "instituted" and "no lawsuit." In the context of this legal rule, the word "instituted" is defined as "to begin or start; commence." BLACK'S LAW DICTIONARY, 801 (7th ed. 1999). The words "no lawsuit" clearly foreclose the institution of any lawsuit whatsoever, regardless of the cause or causes of action pled therein. Thus, Respondent's argument in the instant matter that Rule XIX, § 12(A), as applied by this court, leaves the door open for suits for malicious prosecution and/or abuse of process is untenable. It is absolutely clear that Rule XIX, § 12(A) prohibits all lawsuits predicated on the

complaint or the testimony, and, thus, provides additional protection to complainants and witnesses that the former rule did not provide. The policy decision by this court to protect those who file complaints against lawyers from retaliatory lawsuits avoids a chilling effect upon the proper function of the lawyer regulatory system. This provision is consistent with the overall purpose of Rule XIX to engender confidence by the public in Louisiana's lawyer regulatory system.

The ABA "Commentary" regarding the portion of Rule 12 "Immunity" at issue in this case states, in pertinent part:

> A policy of conferring absolute immunity ... encourages those who have some doubt about a lawyer's conduct to submit the matter to the proper agency, where it may be examined and determined. Without immunity, some valid complaints will not be filed. The individual lawyer may suffer some hardship as the result of the occasional filing of a malicious complaint, but a profession that wants to retain the power to police its own members must be prepared to make some sacrifice to that cause.
>
> It is unlikely that even a malicious complaint will cause any damage beyond some inconvenience. The members of the agency to whom the complaint is submitted will surely not hold it against the lawyer, for their

> very function is to separate meritorious from undeserving complaints.

Model Rules for Lawyer Disciplinary Enforcement, Rule 12: Immunity, Commentary (1993 ed.).

This Rule 12 Commentary explains and confirms the absolute privilege accorded to communications to the board, hearing committees, or disciplinary counsel and the immunity from civil suit accorded to complainants and witnesses.[8] However, the Rule 12 Commentary does not address the issue in this case: whether an attorney is subject to discipline for filing suit against the complainant.

As previously stated, our decision is based on whether Section 12(A) can be considered among "other rules of this jurisdiction regarding professional conduct of lawyers" as provided in Rule XIX § 9(a). We find it disingenuous to assert

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[8] We note that although the wisdom of the rule has b 8 een questioned, the rule has been adopted in other states. For example, the Supreme Court of New Jersey has recognized that the strong public policy in favor of maintaining strict adherence to the rules of discipline required the removal of any impediment to the effective functioning of the disciplinary system. Allowing complainants to be vulnerable to lawsuits brought by lawyers against whom they complained would be an undesirable impediment. Allowing such suits might eliminate some maliciously motivated complaints, but legitimate complaints would similarly be chilled. The public policy considerations making unacceptable any such chilling effect is deemed important enough to overcome well-founded arguments against such immunity. **In re Hearing on Immunity for Ethics Complainants**, 96 N.J. 669, 671-672, 477 A.2d 339, 340 (1984).

otherwise. Admittedly, Section 12(A) does not mention lawyers. However, the provisions specify an absolute privilege for communications and a prohibition of the filing of civil suits against complainants and witnesses. Thus, the prohibition of Section 12(A) addresses itself to lawyers, who in most cases are the subjects of the privileged communications and who would be the ones to institute suits against complainants or witnesses.[9] Thus, we conclude Rule XIX, § 12(A) is a "rule regarding professional conduct of lawyers" and makes lawyers susceptible to discipline for violation of its provisions.

Considering the facts as found by the hearing committee and the conclusions of the board, we agree that Respondent, by filing suit against a complainant for defamation not only violated the spirit of Rule XIX, § 12(A), but was in direct violation of its prohibitions, an action that subjects him to the disciplinary process. See Rule XIX, § 9(a).

In his defense to this court, Respondent argues that the Rules for Lawyer Disciplinary Enforcement cannot form the basis of misconduct or discipline. In support of this contention Respondent cites **In re Harris**, 03-0212, (La. 5/9/03), 847 So.2d 1185. In that case, the ODC filed one count of formal

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[9] It is conceivable that a non-lawyer would be defamed in a communication by a complainant or witness in an attorney-disciplinary proceeding. In which case, Section 12(A) nevertheless prohibits filing a suit against complainants and witnesses, and attorneys would be subject to discipline for filing suit on behalf of non-lawyers. Such allegedly defamed persons would be in violation of this rule if they filed in proper person, but there would be no sanctions against non-lawyers.

charges alleging that respondent's behavior in relation to a previous disciplinary proceeding (**Harris I**), had been in violation of a laundry list of rules; he allegedly "engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); and, in bad faith, obstructed the disciplinary process in violation of Rules 8.1(c) and 8.4(g) and Supreme Court Rule XIX, § 12(A)." **Harris**, 03-0212 at 5, 847 So.2d at 1188.

In the instant case, Respondent relies on the following language: "[T]he board noted that [Supreme Court Rule XIX, § 12(A)] does not provide a disciplinary remedy. Accordingly, the board declined to find that respondent violated Rule XIX, § 12(A)." **Harris**, 03-0212 at 14, 847 So.2d at 1193-1194. Consideration of that statement in the context of the entirety of this court's opinion reveals that Respondent's reliance is misplaced. The statement was included in the "Disciplinary Board Recommendation." Although this court did not specifically repudiate the statement by the board, it is clear from our "Discussion," that violation of Rule XIX, § 12(A) played a significant part in our decision that permanent disbarment was the proper sanction. We stated:

> Bar disciplinary matters come within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. ...

> The record supports a finding of professional misconduct that is unquestionably serious in nature. Respondent manufactured evidence and presented perjured testimony in an attempt to avoid lawyer discipline, and he threatened his former clients with civil litigation if either of them testified against him in the disciplinary proceeding. By engaging in these practices, respondent has violated the most fundamental duty of an officer of the court.
>
> Having found evidence of professional misconduct, the sole issue presented for our consideration is the appropriate sanction for respondent's actions. ...
>
> Respondent's conduct clearly violated duties owed to the public, the legal system, and the profession. In our view, respondent's breach of ethics was profound and directly affected the lawyer disciplinary system and the administration of justice. [Citations omitted; emphasis supplied.]

Harris, 03-0212 at 15-16, 847 So.2d at 1194.

In the board's recommendation to this court in the instant case, the board stated:

> Respondent's post-hoc rationalizations ignore the Section 12(A) proscription which provides that "no lawsuit

> predicated" upon any communications to the board, hearing committee or **disciplinary** counsel "may be instituted against any complainant or witness." [Emphasis added.] Respondent's defamation suit against Ms. Raspanti based upon her complaints to Disciplinary Counsel flies squarely in the face of the Section 12(A) prohibition.
>
> Unlike Respondent, we cannot ignore the plain terms of Section 12(A). We believe the Supreme Court said what it meant and meant what it said in Section 12(A). That provision is essential to the effective functioning of the disciplinary process.

We agree with the board that violation of Rule XIX § 12(A) can subject an attorney to discipline and a finding of professional misconduct, which in turn supports the imposition of sanctions.

Rules of Professional Conduct:

We now consider whether Respondent can be sanctioned for his actions.

Rule 8 of the Rules of Professional Responsibility is entitled "Maintaining Integrity of the Profession," and its five parts run the gamut of provisions regarding bar admissions and disciplinary matters to a provision outlining the jurisdiction of the disciplinary process.

Rule 8.4 is entitled "Misconduct" and provides a list of various acts that constitute professional misconduct. Rule 8.4's definition of professional misconduct is a corollary of Rule XIX, § 10(A), which provides that misconduct shall be grounds for one or more of the sanctions listed therein. Rule 8.4 provides, in pertinent part:

> It is professional misconduct for a lawyer to:
> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> . . . .
> (d) Engage in conduct that is prejudicial to the administration of justice.

We agree with the committee and the board that Respondent's behavior breached Rule 3.1 of the Rules of Professional Conduct and, thus, constituted professional misconduct pursuant to Rule 8.4(a). Rule 3 of the Rules of Professional Conduct is entitled "Advocate"[10] and sets forth the standards a lawyer must follow when he or she assists, defends, pleads, or prosecutes. Rule 3.1, which is the first of

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[10] Compare with Rule 2, which is entitled "Counselor," and includes 10 Rule 2.1, as follows: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The roles of counselor and advocate illustrate the dichotomy of a lawyer's practice.

eight parts, is entitled "Meritorious Claims and Contentions"; it provides, in pertinent part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

The hearing committee and the board concluded that Respondent's civil suit against his former client, which asserted a claim of defamation arising from her complaints to the ODC, was frivolous in nature and violated Rule 3.1. Although Respondent's suit was also a suit for the payment of legal fees and contained assertions of defamatory statements in venues other than disciplinary proceedings, Rule 3.1 clearly provides that an "issue" in a law suit must have a basis in law which is not frivolous. As a practicing attorney Respondent is charged with knowing the law, including the provision of Rule XIX § 12(A) that completely bars his filing a petition that alleges defamation by the complainant. That provision has been in place since 1990, more than a decade before Respondent filed his law suit.

A reasonable lawyer in Respondent's position would have easily concluded that his defamation lawsuit against his former client predicated on her complaints to the ODC was meritless. Because there existed a clear legal bar to the filing of a suit for defamation predicated on Ms. Raspanti's complaints

to the ODC, we agree with the committee and the board that Respondent's suit was frivolous and violated Rule 3.1. We are not the first state to find that the filing of a civil suit in violation of absolute immunity afforded complainants is a frivolous action that violates Rule 3.1. See **In re Spikes**, 881 A.2d 1118, 1125 (D.C. 2005); for violations of similar rules, see also, **Conduct of Adams**, 293 Or. 727, 739-740, 652 P.2d 787 (1982); **Columbus Bar Association v. Elsass**, 86 Ohio St.3d 195, 713 N.E.2d 421 (1999).

In arguing that his suit against Ms. Raspanti was not frivolous Respondent relies on **Goldstein v. Serio**, 496 So.2d 412 (La.App. 4 Cir. 1986), and **Sommer v. State, Department of Transportation and Development**, 97-1929 (La.App. 4 Cir. 3/29/00), 758 So.2d 923.[11]

In **Goldstein**, attorneys filed a lawsuit against former clients after the Louisiana State Bar Association's Committee on Professional Responsibility dismissed the former clients' complaints against the attorneys. The lawsuit sought damages for defamation, malicious prosecution, and abuse of process. The trial court held that the complaints to the Louisiana State Bar Association were absolutely privileged and

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[11] In **Sommer**, the court of appeal held defamatory statements by a State employee to the United States Customs Service about a Customs Service employee were not protected by absolute judicial privilege because the privilege does not protect against intentional destruction of the employee's career. As previously stated, the board rejected Respondent's defense based on **Sommer** because that case did not involve disciplinary proceedings.

maintained the exception of no cause of action. The court of appeal affirmed the trial court's ruling with respect to the defamation claim. However, it reversed the ruling with respect to the malicious prosecution and abuse of process claims, finding that absolute privilege is not an affirmative defense when "the crux of the action is not the statements made but the fact that a proceeding was maliciously and/or illegally pursued." **Goldstein**, 496 So.2d at 415.

In the instant case, the board noted that Respondent's initial petition alleged defamation, but he subsequently added claims of abuse of process and malicious prosecution. The board noted that the ODC did not make an issue of these claims in its formal charges. Nevertheless, the board rejected the **Goldstein** argument, concluding that the "no lawsuit" prohibition contained in Section 12(A) is clearly broad enough to encompass suits for malicious prosecution as well as abuse of process. The board opined that in promulgating Section 12(A), this court could have concluded that providing a complainant or witness with an affirmative defense was insufficient protection since affirmative defenses must be pleaded, LSA-C.C.P. art. 1005, and can be waived. We agree with the board's rejection of Respondent's **Goldstein** argument.

Respondent also cites this court's discussion of **Goldstein** in **Marrogi v. Howard**, 01-1106 (La. 1/15/02), 805 So.2d 1118, a case involving the privilege of absolute immunity for witnesses in civil litigation. In explaining **Goldstein**, this court stated, "[T]he privilege applies to preserve candor in the attorney disciplinary system, yet complaints to

the bar undertaken in malice or in abuse of process are not worthy of such protection." **Marrogi**, 01-1106 at 13, 805 So.2d at 1127. However, as the disciplinary board now points out, **Goldstein** was decided on the basis of LSBA Articles of Incorporation, art. XV, § 13, which did not contain the "no lawsuit" clause now embodied in Section 12(A). The **Marrogi** opinion did not address Rule XIX, § 12(A), and it is clearly distinguishable from a case in the lawyer disciplinary system.

Because we have determined that Respondent's action in filing a civil lawsuit against a complainant violated Rule 3.1, it follows that he engaged in professional misconduct pursuant to Rule 8.4(a) which states, "It is professional misconduct for a lawyer to ... violate the Rules of Professional Conduct."

Finally, even if we were inclined to disagree with the hearing committee and the board concerning their conclusions that Respondent violated Rule 3.1 and, thus, engaged in professional misconduct pursuant to Rule 8.4(a), we conclude that the gravamen of the ODC's formal charges against Respondent lies in misconduct pursuant to Rule 8.4(d), *i.e.*, conduct that is prejudicial to the administration of justice. Filing a lawsuit based on a cause of action which is specifically prohibited by Rule XIX, § 12(A) has a chilling effect on complaints against attorneys and is prejudicial to the administration of justice within the arena of attorney discipline.

In the instant case, where suit against a complainant was actually filed (as contrasted with a threatened lawsuit, as in **Harris**, *supra*) and continued (with various amendments) in violation of Rule XIX, § 12(A), we conclude that Respondent engaged in professional misconduct pursuant to Rule 8.4(d). Accord, **In re Smith**, 989 P.2d 165, 172 (Colo. 10/4/99); **Spikes**, *supra*.

Louisiana Supreme Court Rule XIX, § 10. Sanctions:

Having found evidence of professional misconduct, we now consider the sole remaining issue, *i.e.*, the appropriate sanction for Respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. **Louisiana State Bar Association v. Reis**, 513 So.2d 1173 (La.1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances. **Louisiana State Bar Association v. Whittington**, 459 So.2d 520 (La.1984).

Rule XIX, § 10(A) provides that misconduct shall be ground for this court to impose, among others, one or more of the following sanctions: disbarment, suspension, probation, reprimand.

Rule XIX, § 10(C) provides that this court shall consider the following factors in imposing

sanctions: 1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; 2) whether the lawyer acted intentionally, knowingly, or negligently; 3) the amount of the actual or potential injury caused by the lawyer's misconduct; and 4) the existence of any aggravating or mitigating factors.

In the instant case, the hearing committee recommended Respondent be reprimanded. Neither the ODC nor the Respondent specifically objected to this recommendation. As previously stated, the hearing committee determined that Respondent violated the spirit of Rule XIX, § 12(A) and also violated Rules 3.1, 8.4(a), and 8.4(d) of the Rules of Professional Conduct. The committee also determined that Ms. Raspanti suffered no direct harm; Ms. Raspanti filed at least two non-meritorious complaints against Respondent; and Respondent only represented her at the insistence of their parents. The committee found Respondent's frustration with his sister was understandable, but nevertheless resulted in a rule violation that called for a sanction. The only aggravating factor found by the committee was Respondent's refusal to acknowledge the wrongful nature of his conduct. The committee felt constrained to recognize a violation and recommend a sanction. Accordingly, the committee recommended that Respondent be publicly reprimanded.

On the other hand, the board determined Respondent knowingly violated duties owed to the legal system and to Ms. Raspanti; caused harm to Ms. Raspanti in forcing her to defend the defamation

claim; and took retaliatory action that threatens to undermine the disciplinary system.

In aggravation, the board found the following factors: refusal to acknowledge the wrongful nature of the conduct, lack of remorse, substantial experience in the practice of law, and indifference to making restitution or minimizing the harmful effects of the misconduct. The only mitigating factor was the absence of a prior disciplinary record.

Relying on the ABA's *Standards for Imposing Lawyer Sanctions*, the board determined that the baseline sanction is suspension. The board recommended that Respondent be suspended for one year with all but three months deferred. The board further recommended that Respondent be placed on unsupervised probation for nine months following the active period of the suspension, subject to the condition that any misconduct during this period may be ground for making the deferred suspension executory or imposing additional discipline, as appropriate. Finally, the board recommended that Respondent be assessed with all costs and expenses of these proceedings.

Our *de novo* review of the record in this case convinces us that the recommendation of the hearing committee for a public reprimand is more in line with the nature of Respondent's violation. Our choice of the most lenient discipline available to us pursuant to Rule XIX, § 10 should not be interpreted as deprecating the importance of the rule that was violated in the instant case. Thus, we issue the following caveat.

Considering that the facts of this case were undisputed by Respondent and the ODC, we were left with a single, novel issue: the interpretation and application of Rule XIX, § 12(A). We have resolved that issue by finding the provision accords complainants absolute immunity from civil suits. As the instant case illustrates, not all complainants will be equally justified in making complaints to the lawyer disciplinary system; yet all complainants will have equal, absolute immunity. Granting a complainant absolute immunity when filing a complaint against a lawyer is a part of the disciplinary system adopted from the ABA Model Rules for Lawyer Disciplinary Enforcement in 1990, which are designed to regulate attorneys and sanction those who violate the ethical standards of the legal profession.

Respondent has violated a clear, unambiguous rule that has been in place for almost two decades; if he did not know that filing suit against his former client alleging defamation (and later abuse of process and malicious prosecution) was completely prohibited, he should have known. Louisiana is not the only state to find that violation of the absolute immunity rule is also a violation of the Rules of Professional Conduct prohibiting frivolous lawsuits and interference with the administration of justice. See **Spikes**, *supra*.

However, there are several factors in mitigation of Respondent's knowing violation. First, we are issuing a sanction for a matter for which no one has been sanctioned previously. There are statements in the jurisprudence that might indicate

the possibility of our arriving at an interpretation of Rule XIX, § 12(A) contrary to the interpretation we issue today. For example, the board in **Harris**, *supra*, as recently as 2003, indicated Section 12(A) did not provide a sanction; the board in the instant case found the rule clear and unambiguous.

Second, we do not consider Respondent's lack of remorse an aggravating factor; instead, we find he had a principled belief he was not engaging in inappropriate behavior. While we disagree with his belief, we are at the same time convinced he was sincere in his belief, thus, making any finding of a lack of remorse inappropriate.

Third, we note he has no prior disciplinary record during his lengthy career.

Next, although Respondent cannot avoid discipline by relying on the fact that he was represented by counsel in his suit against his sister, that fact may be considered in mitigation.

Finally, as did the hearing committee, this court recognizes that Respondent represented his sister only because his parents urged him to do so. Unlike the completely unprovoked threat of a civil suit in **Harris**, Respondent's suit apparently was filed in an attempt to put an end to what the ODC determined to be baseless complaints on the part of his former client.

Regardless of the mitigating factors listed above, we find that Respondent in failing to refrain from filing a civil suit violated a duty he owed to a

former client, the public, the legal system and the profession. He acted with, at least, constructive knowledge of a prohibition. Although he may have caused injury to his former client because she was called upon to defend herself, such injury was not substantial because there was ongoing litigation regarding a fee dispute.

Accordingly, we conclude that a public reprimand issue against Respondent, and that he be cast for costs of these proceedings.

PUBLIC REPRIMAND IMPOSED; RESPONDENT CAST FOR COSTS OF THESE PROCEEDINGS.

[ENTERED: MAY 22, 2009]

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #30

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the **22nd day of May, 2009**, the following actions were taken by the Supreme Court of Louisiana in the case(s) listed below:

APPLICATIONS FOR REHEARING DENIED:

2008-B -0954 IN RE: ROY A. RASPANTI

2008-C -1044
C/W JOHN KEITH RICHARD v. LAFAYETTE FIRE AND POLICE CIVIL SERVICE BOARD AND LAFAYETTE CONSOLIDATED GOVERNMENT (Parish of Lafayette)
2008-C –1623 JOHNSON, J., would grant.
TRAYLOR, J., would grant.
KNOLL, J., would grant

2008-C -1159 JUDITH SANDIFER FORMERLY KNOWN AS JUDITH HONAKER v. THE LOUISIANA STATE BOARD OF PRACTICAL NURSE EXAMINERS, FILMORE P. BORDELON, RUBY R.

CHANCELLOR, ROBERTA R. CONNELLEY, GWENDOLYN M. DUNN, SHARON K. FORE, BOBBY G. FULMER, PATRICIA S. JUNEAU, ANN C. LAWS, REBECCA A. NELSON, ROSEMARY S. PASSANTINO, EUGENE C. ST. MARTIN, WILLIAM SONNIER, JR., IDOLPHUS C. TURNLEY, JR., AND CLAIRE D. GLAVIANO (Parish of E. Baton Rouge)
WEIMER, J., would grant.

2008-C -1491 KAREN KING v. ILLINOIS NATIONAL INSURANCE COMPANY, ET AL. (Parish of Webster)
KIMBALL, C.J., would grant rehearing.
JOHNSON, J., would grant rehearing

2008-B -2356 IN RE: JOHN E. DEMORUELLE
VICTORY, J., would grant.
WEIMER, J., would grant.

FILED: MAY 5, 2009

LOUISIANA SUPREME COURT

NO. 2008-B-0954

IN RE: ROY RASPANTI

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF RESPONDENT'S APPLICATION FOR REHEARING

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* * *

RULE XIX SECTION 12(A) VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 22 OF THE LOUISIANA CONSTITUTION AS IT CONSTITUTES A DEPRIVATION OF A LAWYER'S RIGHT OF ACCESS TO THE COURTS

This brief will show:

1. Louisiana Supreme Court Rule XIX Section 12(A) violates Article 1 Section 22 of the Louisiana Constitution in that it deprives lawyers of their right of access to the Courts.

2. Rule XIX Section 12(A) violates the First Amendment of the United States Constitution for the same reason, *i.e.*, because it deprives a lawyer of his right of access to the Courts.

3. Only a compelling interest will justify such a deprivation.

4. There is no compelling State interest which will justify such an intrusion based upon the Louisiana Supreme Court's ruling in *In Re: Ivan David Warner and Steven Joseph Rando*, #05-B-1303, Lawyer Disciplinary Proceedings.

A.

RULE XIX SECTION 12(A) VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AS IS CONSTITUTES A DEPRIVATION OF A LAWYER'S RIGHT OF ACCESS TO THE COURTS

The United States Court of Appeals for the Fifth Circuit stated the following in *Ryland v. Shapiro*, 708 F.2d 967, 971-972 (1983):

"The Substantive Right of Access to Courts:

> The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution. In *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907), the Supreme Court characterized this right of access in the following terms:
>
> > The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is

> allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

207 U.S. at 148, 28 S.Ct. at 35 (citations omitted). It is clear that the Court viewed the right of access to the courts as one of the privileges and immunities accorded citizens under article 4 of the Constitution and the fourteenth amendment.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Supreme Court found in the first amendment a second constitutional basis for this right of access: "Certainly the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right of petition." *Id.* 92 S.Ct. at 612.

This court recognized the first amendment right of access to the courts in *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir.1979), where we stated: "It is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances." Id. at 1387. See also

> *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1363 (5th Cir.1983).
>
> A number of other courts have also recognized that this right of access is encompassed by the first amendment right to petition. See *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir.1972); *Harris v. Pate*, 440 F.2d 315, 317 (7th Cir.1971); *Pizzolato v. Perez*, 524 F.Supp. 914, 921 (E.D.La.1981); *Crews v. Pertrosky*, 509 F.Supp. 1199, 1204 n. 10 (W.D.Pa.1981).
>
> . . .In conclusion, it is clear that, under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, *and only compelling state interests will justify such intrusions*." (Emphasis added)

The Fifth Circuit also pointed out that another constitutional basis for the right of access to the courts is found in the due process clause. See p. 972, *Rylands*.

In *N.A.A.C.P. v. Button*, 83 S.Ct. 328, 340-341 (1983) the State of Virginia contended that it had a subordinating interest in the regulation of the legal profession which justified limiting the petitioner's First Amendment rights. Virginia argued that N.A.A.C.P.'s activities fell "within the traditional

purview of state regulation of professional conduct." See p. 340-341, *N.A.A.C.P.*. The Supreme Court stated:

> ". . . The decisions of this Court have consistently held that only a *compelling state interest* in the regulation of a subject within the State's constitutional power to regulated can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by the petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. *For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.* See *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; *Konigsberg v. State Bar*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810. Cf. *In re: Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed. 1473. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, we said, 'In the domain of these *indispensable liberties, whether of speech, press, or association*, the decisions of this Court recognized that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' Later, in *Bates v. Little Rock*, 361 U.S.

> 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480, we said, '[w]here there is a significant encroachment upon *personal liberty*, the State may prevail only upon showing a subordinating interest which is *compelling*.' Most recently, in Louisiana ex rel. *Gremillion v. NAACP*, 366 U.S. 293, 297, 81 S.Ct. 1333, 1336, 6 L.Ed.2d 301, we reaffirmed this principle: '. . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.'" (Emphasis added) P. 341.

B.

RULE XIX SECTION 12(A) ALSO VIOLATES ARTICLE 1 SECTION 22 OF THE LOUISIANA CONSTITUTION

Article 1 Section 22 of the Louisiana Constitution states:

> "**§ 22. Access to Courts**
>
> Section 22. All courts shall be open, and every person *shall* have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in this person, property, *reputation*, or other rights." (Emphasis added)

Also pertinent are Article 1 Section 1 and 7:

> "**§ 1. Origin and Purpose of Government**
>
> Section 1. All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The right enumerated in this Article and *inalienable* by the state and shall be preserved inviolate by the state." (Emphasis added)

And

> "**§ 7. Freedom of Expression**
>
> Section 7. No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, *but is responsible for abuse of that freedom*." (Emphasis added)

The Louisiana Supreme Court first addressed this law in *Kennedy v. Item Co.*, 34 So.2d 886, 890 (La. 1948), a case decided under the Louisiana Constitution of 1921 but it is still pertinent today:

" The very foundation upon which the law of libel is laid is the protection of reputation. The right to a good name and fame is as absolute and as essential to the 'pursuit of happiness' as is the right to life and liberty, characterized in our Declaration of Independence as among those "inalienable rights with which all men, being created equal, are endowed by their Creator.' A man's reputation is recognized to be an invaluable, and is given the same dignity in the Bill of Rights that comprises Article I of our constitution, as his right to due process of law in the protection of his life, liberty, and property...: freedom of religion...; freedom of speech and of the press...; peaceable assemblage...; and freedom from unreasonable searches and seizures...; for in Section 6 (present Section 22 of the Louisiana Constitution) of this article we find the guaranty that *'All courts shall be open, and every person for injury done him in his* rights, lands, goods, person or *reputation shall have adequate remedy by due process of law* and justice administered without denial, partiality or unreasonable delay.' Thus the general declaration in Section 3 (present Section 7 of the Louisiana Constitution) of the Bill of Rights that 'No law shall ever be passed to curtail or restrain the liberty of speech or of

> the press,' is not only qualified by the clause immediately following that 'any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty,' but also by the specific guaranty in Section 6 (present Section 22 of the Louisiana Constitution) that the courts are open for the redress of injury to reputation by the irresponsible use of the right to freely express one's sentiments." (Emphasis in text)

It is respectfully submitted that this Honorable Court's holding that a lawyer is prohibited by Rule XIX Sec. 12(A) from filing a lawsuit against a complainant for having filed a malicious complaint against him - no matter how malicious and no matter how many times it has been done - for the purpose of defending his reputation from such malicious attacks denies said lawyer access to the courts in violation of the First Amendment of the United States Constitution and Article 1 Section 22 of the Louisiana Constitution.

Its is respectfully submitted that Rule XIX Sec. 12(A) was promulgated by this Honorable Court, a state entity, and directly abridges speech, thus the protections of the First Amendment apply to this Rule. *Warner*, *supra*, p. 11, 77. Rule XIX Sec. 12(A) also directly abridges Article 1 Section 7, Section 1 and Section 22 of the Louisiana Constitution.

C.

ENCOURAGING THE FILING OF COMPLAINTS IS NOT A COMPELLING STATE INTEREST

The main reason put forth by the Office of Disciplinary Counsel for rule XIX Sec. 12(A) is to encourage the filing of complaints. It is respectfully submitted that encouraging the filing of complaints is not a compelling state interest as this Honorable Court pointed out in *In Re: Ivan David Warner and Steven Joseph Rando*, #05-B-1303 (4/17/09 Release 21). On page 67 of said opinion, two of the four courts (*R.M. v. Sup. Ct.*, 883 A2d at 378-379 and *Doe v. Doe*, 127 S.W. 3d at 735) that completed an in-depth First Amendment analysis of confidentiality rules in the context of an attorney discipline system explicitly held that the interest of encouraging the filing of complaints and encouraging participants to cooperate with disciplinary investigations did not qualify as compelling under strict scrutiny. This Honorable Court also pointed out that the other two courts who completed this study (*Petition of Brooks*, 678 A2d at 145 and *Doe v. Sup. Ct.*, 734 F.Supp. At 985) also held that the confidentiality rules in question could not survive strict scrutiny on the basis of these interests but on different grounds.

As this Honorable Court pointed out on page 52 of its April 17, 2009 opinion in the *Warner* case cited above:

> " We must approach the strict scrutiny analysis 'with the posture the Supreme Court has long prescribed for

> this inquiry: 'it is the rare case in which... a law survives strict scrutiny.'"

It is respectfully submitted, that as has been seen above, this is not that rare case.

D.

Separate and apart from the issues discussed above, it is respectfully submitted that this Honorable Court's opinion in *Warner*, *supra* rendered on April 17, 2009, demonstrates another factor in the case at bar that is in common with *Tobkin v. Jarboe*, 710 So.2d 975 (Fla. 1998) cited by respondent in his application for rehearing. Grievance proceedings are not confidential in Florida and according to *Warner*, they are not confidential in Louisiana either.

E.

Finally, it is respectfully submitted, respondent in the case at bar does not have to be right on the law to avoid reprimand, he only has to show that his argument was based on "principled belief" and good faith argument which, it is respectfully submitted, this Honorable Court has acknowledged, in order to demonstrate that he did not violated 3.1 in the case at bar. And, if he did not violate 3.1, he could not have violated 8.4a or 8.4d because his alleged violation of 8.4a and 8.4d is based on pleadings which he filed.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing pleading has been served upon all counsel of record, via facsimile and/or by placing a copy in the U.S. Mail, this 5 day of May, 2009.

/s/ Roy Raspanti
ROY A. RASPANTI

FILED: APRIL 14, 2009

LOUISIANA SUPREME COURT

NO. 2008-B-0954

IN RE: ROY RASPANTI

RESPONSE TO OPPOSITION OF OFFICE OF DISCIPLINARY COUNSEL TO RESPONDENT'S APPLICATION FOR REHEARING

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* * *

argument be "prejudicial to the administration of justice" (Rule of Professional Conduct 8.4d)? Finally, if making such an argument is not violative of 3.1, how can making such an argument be violative of 8.4d? More particularly, how can an argument which has

> "...a basis in law and fact...that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." (Rule of Professional Conduce 3.1)

possibly be "prejudicial to the administration of justice" (Rule of Professional Conduct 8.4d)?

3.

The issue resolved by this Honorable Court by its March 17, 2009 opinion was *res nova*. Page 2, footnote 1, 3/17/09 Judgment, #08-B-0954, *In Re: Roy Raspanti*. It is now the law. It is respectfully submitted that by virtue of the fact that the issue resolved herein by this Honorable Court was *res nova*, it was not the law prior to March 17, 2009. As this Honorable Court states on page 23 of its March 17, 2009 decision:

> "There are statements in the jurisprudence that might indicate the possibility of our arriving at an

> interpretation of Rule XIX Sec. 12(A) contrary to the interpretation we issue today. For example, the Board in *Harris*, *supra*, as recently as 2003, indicated Sec. 12(A) did not provide a sanction; the Board in the instant case found the Rule clear and unambiguous."

It is respectfully submitted that sanctioning respondent for violating the law first announced by this Honorable Court on March 17, 2009 on this *res nova* issue because of an action he took in 2003 would be, by definition, the enforcement of an *ex post facto* law.

4.

Respondent is not "[expanding] the record in these proceedings by alleging facts." The fact that complainant made the same complaint against respondent in the

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FILED: MARCH 31, 2009

LOUISIANA SUPREME COURT

NO. 2008-B-0954

IN RE: ROY RASPANTI

APPLICATION FOR REHEARING

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* * *

The *Spikes* court referred to the "consistent interpretation given the Rule by this court" and said that "the case law of this court weighs entirely against" the suit filed by Spikes in that case (*Spikes* p. 1123). On the other hand, in the case at bar, this Honorable Court has pointed out in its Opinion of March 17, 2009 that, based upon statements in the jurisprudence, it could have arrived at an interpretation of Rule XIX Sec. 12(A) contrary to the interpretation it issued on March 17, 2009 in the case at bar. Give this fact, it is respectfully submitted, respondent could have reasonably concluded that there was at least a:

> "...faint hope of success on the legal merits..." and this his argument was not "wholly lacking in substance" P. 1125, *In Re: Spikes*

and if that is so, then according to *Spikes* cited by this Honorable Court in its March 17, 2009 Opinion, respondent's argument was not frivolous. (See p. 1125, *Spikes*, *supra*)

3.

Black's Law Dictionary defines *ex post facto* law as:

> "A law that applies retroactively, esp. in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed. Ex post facto criminal laws are prohibited by the U.S. Constitution."

This Honorable Court has now, for the first time, interpreted Rule XIX Sec. 12(A) of the Rules for Lawyer Disciplinary Enforcement to be a Rule of Professional Conduct (RPC). This Honorable Court pointed out that in 1990 Art. XV of the Louisiana State Bar Association Articles of Incorporation was entitled "*Discipline* and *disbarment* of Members" (p. 10, 3/17/09 Opinion, emphasis added) and that prior to its reenactment, Louisiana Supreme Court Rule XIX provided:

> "All matters *touching upon* the *discipline* and *disbarment* of members of the Bar shall be governed by Art. XV of the Articles of Incorporation of the Louisiana State Bar Association, as amended, and as approved by this court." Footnote 5, p. 10, 3/17/098 Opinion. (Emphasis added)

This Honorable Court also referenced Rule XIX Sec. 9:

> "It shall be a ground for discipline for a lawyer to:
> (a) violated or attempt to violate the Rules of Professional Conduct or any other rules of this jurisdiction *regarding* professional conduct of lawyers." P. 9, 3/17/09 Opinion.

It is respectfully submitted that reference to a good dictionary will demonstrate that the phrase "touching upon" and the word "regarding" (along with the words concerning, relative to, concern,

having to do with, respecting, connected with) are basically synonymous. The key, though is that the words "discipline" and "disbarment" are used and the words "professional conduct" are not. It is respectfully submitted that old Art. XV, never had anything to do with professional conduct of lawyers. It only "touched upon" *discipline* and *disbarment* of members and the reenacted Rule XIX which was put in its place also only "touches upon" or "regarded" *discipline* and *disbarment*. As this Honorable Court stated on pages 10-11 of its March 17, 2009 Opinion:

> "...Louisiana Supreme Court Rule XIX was reenacted to incorporate the "Rules for Lawyer Disciplinary Enforcement." The "Rules of Professional Conduct" remained and still are in Article XVI of the LSBA Articles of Incorporation. However, the reenacted Rule XIX changed the *disciplinary* procedure and the *sanctions* imposed for professional misconduct." (Emphasis added)

It is respectfully submitted that even if a lawyer had researched the history of Rule XIX Sec. 12(A) and the old Rule XV of the Articles of Incorporation of the Louisiana State Bar Association, the reasonable conclusion that a reasonable lawyer would have come to would have been that the former Rule XV and the present Rule XIX Sec. 12(A) "touched upon" or "regarded" only *discipline* and *disbarment* of members and not *professional conduct* of members of the Louisiana State Bar Association. Presumably, if the Louisiana Supreme Court had meant for the old Art. XV of the

Articles of Incorporation of the Louisiana State Bar Association or the reenacted Rule XIX and, more particularly, Rule XIX Sec. 12(A), to "touch upon" or "regard" or relate to the Rules of Professional Conduct it would have said so. It is respectfully submitted that given these provisions and their history, announcing today that Rule XIX Sec. 12(A) is and has presumably always been a "rule...regarding professional conduct of lawyers" and punishing respondent for violation of same would be the very definition of an ex post facto law. Moreover, this Honorable Court's statement that:

> There are statements in the jurisprudence that might indicate the possibility of our arriving at an interpretation of Rule XIX Sec. 12(A) contrary to the interpretation we issue today."

would also support the conclusion that punishing respondent for violation of Rule XIX Sec. 12(A) based upon the interpretation first announced by this Honorable Court in the same March 17, 2009 Opinion is, again, by definition, an ex post facto law. Again, in *Spikes*, *supra*, the court therein pointed to a "consistent and unambiguous state of the law" and "consistent decisional law" and the "consistent interpretation given the Rule by this court" (*supra*). It is respectfully submitted that the question is, now can a Rule first interpreted here on March 17, 2009 have, by clear and convincing evidence, been violated prior to its interpretation?

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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing pleading has been served upon all counsel of record, via facsimile and/or by placing a copy in the U.S. Mail, this 31 day of March, 2009.

/s/ Roy Raspanti
ROY A. RASPANTI

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Fourteenth Amendment - Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Lawyer Disciplinary Enforcement
Rule 19 § 12A

Section 12. Immunity.

A. **From Civil Suits.** Communications to the board, hearing committees, or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged, and no lawsuit predicated thereon may be instituted against any complainant or witness. Members of the board, members of the hearing committees, disciplinary counsel, staff, probation monitors and monitoring lawyers appointed pursuant to this rule or its appendices, inventorying lawyers appointed pursuant to Section 27, members of the Ethics Advisory Committee adopted by resolution to the House of Delegates and approved by the Board of Governors of the Louisiana State Bar Association on November 2, 1991 and members of the Lawyer Advertising Advisory Service Committee adopted by resolution to the House of Delegates and approved by the Board of Governors of the Louisiana State Bar Association o June 9, 1995, shall be immune from suit for any conduct in the course of their official duties or reasonably related to their official duties.